STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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TONY KNOWLES, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-8554

August 16, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: WC Docket No. 02-201, ACS of Anchorage, Inc. and ACS of Fairbanks, Inc., Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and 252(e)(5) of the Communications Act

Dear Ms. Dortch:

Enclosed on behalf of the Regulatory Commission of Alaska, are an original and 6 copies of the Regulatory Commission of Alaska's comments on the above referenced petition.

Please stamp and return to me the additional copy provided for that purpose. If you have any questions, please contact me at (907) 269-5100.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:
Steve DeVries
Assistant Attorney General

cc: Karen Brinkmann
ACS
Mark Moderow

SD/sjm

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.	)	
	)	WC Docket No. 02-201
Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and 252(e)(5) of the Communications Act	)	

COMMENTS OF THE REGULATORY COMMISSION OF ALASKA

I. Introduction

ACS has not presented valid justification for Commission preemption of the Regulatory Commission of Alaska ("RCA"). In order to justify preemption under the Telecommunications Act of 1996 (the "Act"), Commission regulation and precedent, ACS must demonstrate that the RCA has "failed to act" by refusing to undertake its section 252 duties, or by failing to perform these duties within the Act's deadlines. The RCA has not "failed to act."

In the Anchorage proceedings, there are two reasons. First, as ACS conceded in a previous hearing before the RCA, the Act's timelines do not apply because no new request for negotiation or arbitration is involved. Rather, the ongoing proceedings involve ACS' protracted requests to modify a previously approved interconnection agreement. Second, the RCA has diligently taken action on each ACS modification request. There is no basis to conclude that the RCA has been dilatory.

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ANCHORAGE BRANCH
[illegible] W FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Nor has the RCA "failed to act" in the Fairbanks docket. The RCA approved an arbitrated interconnection agreement within the Act's deadlines, and ACS is contesting the RCA's decision in federal court.[1] The Commission has made it clear that preemption requests are not granted in order to review the merits of state commission decisions. Yet, this is exactly what ACS is asking the Commission to do.[2] Finally, the RCA's assertion of its sovereign immunity in federal court does not bar it from contesting FCC preemption. ACS provides no analysis for its unique estoppel claim, and the authority it cites to does not support its argument.

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[1] In *Verizon Maryland, Inc. v. Public Service Comm'n*, 535 U.S. __, 122 S.Ct. 1753 (2002)("*Verizon*"), the Supreme Court recently determined the federal courts have jurisdiction to review the merits of state commissions decisions taken under section 252 of the Act. Such a proceeding can be initiated by naming the state commissioners in their official capacity under the doctrine of *Ex parte Young*. 122 S.Ct. at 1759 – 1760.

[2] Although the Commission's July 30, 2002 Public Notice says it will not be addressing ACS' substantive pricing issues at this junction, the Commission should be aware that ACS' petition is riddled with material omissions and misstatements. For example, at page 40, ACS says the Anchorage arbitration agreement is "silent as to the rates applicable after 1999." ACS fails to mention that RCA Order U-96-89(8) at pages 8-9 shows that parties intended that the rates in effect in 1999 would stay in effect "thereafter," and have in fact done so. On page 29 of its Petition, ACS infers that the RCA breached TELRIC principals by using the wrong capital structure and depreciation rates. Yet ACS omits any mention that the RCA-confirmed arbitration decision used depreciation rates calculated from ACS' own depreciation study, and a capital structure based on ACS' then current actual debt/equity structure. *See Arbitration Decision on Model Inputs*, filed in RCA Docket Nos. U-99-141/142/143, at p. 46 (July 17, 2000). ACS also provides incomplete information at page 30 of its Petition. There, it implies the RCA used the wrong loop length in its decision. Yet, again, ACS does not discuss the fact that the approved arbitration decision adopted ACS' own proposed loop length. *Id.* at p. 23.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

In summary, ACS' claims that the RCA has "failed to act" are fiction. The Commission should dismiss ACS' Petition.

II. Procedural Status of Anchorage and Fairbanks Cases

In order for the Commission to assess whether the RCA has "failed to act", it is necessary to review what actions the RCA has taken under the Act in the dockets ACS complains about. This procedural history makes it abundantly clear that the RCA has and is fulfilling its section 252 responsibilities. The RCA has acted appropriately, and within the required timelines.

A. Anchorage

In 1996, General Communications, Inc. ("GCI") petitioned for arbitration of an interconnection agreement with ATU, the former owner of ACS's Anchorage facilities, under 47 U.S.C. § 252(b).[3] Within six months of the filing, the Alaska Public Utilities Commission ("APUC"), predecessor agency to the RCA, reached a decision and issued an order approving an arbitrated interconnection agreement reached by the parties.[4] In its order, the APUC stated that all prices in the interconnection agreement

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[3] The GCI Petition is dated July 29, 1996.

[4] Order U-96-89(9) (January 14, 1997), modifying Order U-96-89(8) (December 16, 1996). All referenced RCA orders are public records, copies of which are available on-line at www.state.ak.us/rca/orders/index.html.

were temporary, pending further RCA action after it had evaluated "a full cost study based upon a cost methodology to be determined by the [RCA] at a later date."[5]

It was not until January 24, 2000, that ACS filed a Motion to Establish Forward Looking Economic Cost Models and Methodologies. The RCA granted this motion on March 6, 2000, and asked for briefs on what model should be used for this study.[6] After full briefing, on May 30, 2000, the RCA adopted the FCC's cost model, which was the same cost model being used for separate ongoing proceedings for Fairbanks and Juneau service areas. The RCA also granted the parties an opportunity to argue for changes in the cost model, and scheduled further Anchorage proceedings to follow the conclusion of the ongoing Fairbanks and Juneau arbitration.[7]

The Fairbanks and Juneau proceedings concluded on August 24, 2000[8], and a scheduling conference was held for the Anchorage docket on October 19, 2000. At the hearing, ACS provided notice that it wanted the RCA to consider changes it wanted to propose to the cost model. The RCA granted this request on January 8, 2001, and ordered further briefing on the issue.[9] The RCA also noted in this order that the parties agreed that the procedural deadlines contained in section 252(b)(4) of the Act

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5 Order U-96-89(9), at p. 3. Further RCA action on an appropriate cost study was necessary because during the arbitration, "neither party developed forward-looking cost studies." Order U-96-89(8) at p. 18.

6 Order U-96-89(13) (March 6, 2000).

7 Order U-96-89(14)(May 30, 2000), at pages 3 – 4 & n. 9.

8 These proceedings are described in detail below.

9 Order U-96-89(15)(January 8, 2001) at pages 2 & 4.

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ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

did not apply to the Anchorage proceeding because no new request for negotiation or arbitration was at issue.[10]

After reviewing the parties' responses, on May 11, 2001 the RCA concluded that it needed further information on alternative methods for pricing UNEs. Added information was necessary because forward looking cost methodologies were, at that time, in a state of flux pending the Supreme Court's decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. ___, 122 S.Ct. 1646 (2002) which was to address the validity of the FCC's forward looking TELRIC principals.[11] This schedule was delayed because ACS failed to serve GCI with information supporting its proposed modifications to the model as ordered by the RCA.[12] After another round of briefing the RCA issued an order determining that the cost study which would ultimately be adopted would be based on an "efficient ILEC standard." UNE prices would be determined "based on the cost of replacing [ACS'] network existing today with the most efficient technology [ACS] has actually employed."[13] The RCA scheduled a February 15, 2002 hearing to allow the parties to argue whether the competing models could "produce

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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[10] *Id.*, at p. 4, n. 15: "The parties do not argue that the deadlines for commission approval of an interconnection agreement under the Act now apply in this docket. . . . A new request for negotiation or petition for arbitration under the Act has not occurred in this docket and the procedural timelines of Section 252(b)(4)(c) do not apply."

[11] Order U-96-89(20) (May 11, 2001), at pages 2 - 4.

[12] *See* Orders U-96-89(20)(January 8, 2001) at p. 6, n. 16, and U-96-89(21) (July 5, 2001), at p. 3.

[13] Order U-96-89(24)(February 8, 2002) at p. 11.

results consistent with an efficient ILEC standard and be compliant with the total long-run incremental cost (TELRIC) principals established by the [FCC]."[14]

The parties presented experts and testimony on their competing models. Because ambiguities existed at the hearing concerning ACS' proposed model, ACS requested that the RCA hold a workshop to facilitate an adequate exchange of information between the parties. The RCA granted ACS' request, and ordered the results of the workshop to be presented by May 22, 2002.[15]

After it reviewed the parties workshop reports, on July 29, 2002, the RCA adopted ACS' proposed the cost model, and set a two-phase arbitration procedure to resolve UNE rates for Anchorage.[16] However, in agreeing to adopt ACS' proposed model, the RCA noted that much of the time taken to move towards final UNE rates had evolved as a result of ACS' own advocacy, and it warned that proceeding with ACS' current proposal would create added delay:

> "We also note that the major delays in adopting new rates have been due, in part, to ACS-AN's advocacy of its model over our earlier decision to use the FCC model . . ."
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> . . .
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> "Nonetheless, we are willing to use the ACS-AN approach if the parties are given adequate opportunity to fully understand and correct it. In that regard we believe it is necessary to point out that ACS-AN, which has strenuously advocated for the use of this

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[14] Order U-96-89(25)(April 8, 2002) at p. 2.

[15] Order U-96-89(25) (April 8, 2002) at pages 9 – 10.

[16] Order U-96-89(26) (July 29, 2002). Issuance of this Order appears to moot many of the issues raised by ACS in their Petition. *See* ACS Petition at pages 11 – 12.

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

> manual and potentially time consuming approach, is also the party that has been equally strenuous in arguing for a quick resolution of this docket. If ACS-AN is willing to live with the delays inherent in using this model, we are willing to accommodate their request that it be used in this proceeding. We rely on ACS-AN's representations, during the course of the hearing and the workshop, of its willingness to devote the time and resources necessary to fix the model."[17]

During the term of these Anchorage proceedings, ACS was also able to seek interim relief from the RCA based on its claims that the UNE loop rates previously set in 1997 were inadequate. It filed such a request on June 11, 2001. After briefing and argument, the RCA granted ACS an interim increase in UNE loop rates for Anchorage, but the interim rates set were lower than ACS requested.[18] Although ACS contends that this order set interim rates at an unreasonable level,[19] it could have appealed this order.[20] It chose not do so.

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[17] Order U-96-89(26) at p. 5 – 6 & n. 13.

[18] Order U-96-89(23) (October 25, 2001).

[19] ACS Petition at p. 12. What ACS ignores in setting forth this line of complaint is that under state law, ACS, not GCI, bore the burden of demonstrating, by a "probable success on the merits" standard, that its proposed rates were proper. Order U-96-89(23) at p. 5 – 6, citing *A.J. Industries v. APUC*, 470 P.2d 537 (Alaska 1970) and *APUC v. Greater Anchorage Area Borough*, 534 P.2d 549 (Alaska 1975). ACS failed to meet this burden. ACS had requested UNE loop rates be increased 73% from $13.85 per loop to $24 per loop. GCI showed that use of the previously approved FCC model, with inputs determined in the Fairbanks/Juneau arbitration, produced a $14.92 loop rate. Although GCI ultimately agreed that a $14.92 loop rate was reasonable, it had previously contended this rate was too high for Anchorage. The RCA adopted this $14.92 interim loop rate for Anchorage. It also noted that it would revisit the issue if ACS presented additional competent evidence showing further interim rate relief was appropriate. Order U-96-89(23) at pages 2, 5 – 11. ACS has never done so.

[20] *See e.g., U.S. v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 494 (Alaska 1979).

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1031 W. FOURTH AVENUE, SUITE 200
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PHONE: (907) 269-5100

B. Fairbanks

In 1997, General Communications, Inc. ("GCI") petitioned the RCA to terminate ACS' rural exemption in Fairbanks pursuant to 47 U.S.C. § 251(f). Following a hearing, and reconsideration, the RCA issued an order on October 11, 1999 terminating this rural exemption.[21]

Following the termination of ACS' rural exemption, GCI attempted to negotiate an interconnection agreement with ACS. These negotiations failed, and on December 8, 1999, GCI petitioned the RCA for arbitration under 47 U.S.C. § 252(b). Hearings were held on the petition, and the resulting arbitration decisions established the terms of interconnection between ACS and GCI for Fairbanks, and set the UNE prices GCI would pay ACS. This arbitration decision was approved, in part, and modified in part, by the RCA on August 24, 2000.[22]

On September 25, 2000, ACS filed a complaint in federal district court naming the RCA and GCI as defendants.[23] The complaint alleges the federal district court has jurisdiction under 47 U.S.C. § 252(e)(6) to review the merits of the RCA's decision to approve the arbitration decision. Exhibit B, p. 3.

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[21] Orders U-97-82(11), U-97-143(11), U-97-144(11)(October 11, 1999). ACS' rural exemption for Juneau was also terminated at this time; however issues pertaining to the Juneau docket do not appear to be at issue in ACS' FCC filing.

[22] Orders U-99-141(9), U-99-142(9), U-99-143(9)(August 24, 2000).

[23] Although ACS initially named the RCA's commissioners as defendants in its complaint, on December 1, 2000, it dismissed them from the federal court action. ACS provided no explanation for its decision to dismiss its action against the RCA's commissioners. Exhibit A.

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

This federal court action is now stayed pending review by the Ninth Circuit Court of Appeals. The issue before the Ninth Circuit is whether the RCA's Eleventh Amendment immunity bars the federal court action.[24] The United States Supreme Court in its *Verizon* decision last term did not decide this sovereign immunity issue. The Court left unanswered whether the Fourth Circuit Court of Appeals was correct in concluding that state sovereign immunity protections guaranteed under the Eleventh Amendment bar naming state commissions as defendants in federal court to contest their section 252 decisions. *Verizon,* 122 S.Ct. at 1757, 1760.[25] Oral argument before the Ninth Circuit on the RCA's outstanding immunity claim is currently scheduled for September 30, 2002. Exhibit C.[26]

III. Argument

ACS' lengthy petition can be rendered down to three basic complaints. First, focusing on Anchorage, ACS complains that the RCA has "failed to act" by not establishing a cost model or scheduling a hearing to set final UNE rates. Second, focusing on Fairbanks, ACS complains that decisions made by the RCA in approving an

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[24] *See ACS of Fairbanks, Inc. v. GCI Communications Corp. et. al.*, Appeal No. 01-35344 (9th Cir. Court of Appeals).

[25] In *Verizon*, the Supreme Court avoided answering this question by focusing instead on the issue of whether state commissioners were immune from suit in federal court. The Court held only that the doctrine of *Ex parte Young* permitted the federal court suit to proceed against state commissioners, individually, in their official capacity. In the ACS federal court action, however, the only state defendant is the RCA.

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

arbitrated interconnection agreement violate various aspects of federal law. For both service areas, ACS claims UNE rates set by the RCA are confiscatory, and result in ACS being subjected to financial harm.

From this platform, ACS requests declaratory relief by suggesting that the Commission review the merits of the RCA's decisions. ACS then asks the Commission to issue an order, under 47 U.S.C. § 252(e)(5) preempting the jurisdiction of the RCA for failing to "carry out its responsibilities under section 252 of the Act."[27]

For the reasons set forth below, the Commission should deny this petition. There is no foundation in law or Commission precedent supporting ACS' preemption requests.

A. Standards for Commission Preemption Under the Act

47 U.S.C. § 252(e)(5) provides the statutory framework for FCC preemption:

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[26] Given the Supreme Court's decision in *Verizon*, had ACS not chosen to dismiss its federal court action against the RCA's commissioners, it would now be obtaining the judicial review its claims it is lacking.

[27] ACS also makes a collateral argument at pages 5 and 22 of its petition that requires a response. There, ACS suggests that the RCA's charter will sunset, and that the RCA will not have sufficient time to resolve Anchorage interconnection issues before its operations as a regulatory agency cease. This argument is disingenuous. Attached as Exhibit D is the Alaska Legislature's June 26, 2002 bill extending the operations of the RCA. Section 5 of the Bill shows the RCA's charter is extended until June 30, 2003. At that time, under Alaska Stat. 44.66.010(b), if the legislature chose not to extend the RCA's charter further, the RCA would enter a one-year "winddown" period. However, during the same legislative hearings referenced by ACS at page 5 of its petition the Senate Judiciary Committee's chairman made it abundantly clear that the Alaska State Legislature has no intention of terminating the RCA's charter. Audiotapes of these legislative hearings may be reviewed on-line at www.ktoo.org/gavel/audio.cfm.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

> "If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure . . ."

The Commission's regulations at 47 C.F.R. § 801(b) implement this section of the Act by defining the circumstances under which a state commission can be deemed to have "failed to act." Preemption is warranted where a state commission refuses to entertain an arbitration or mediation request, or where it fails to finish its arbitration duties with the statutory deadline:

> "For purposes of this part, a state commission fails to act if the state commission fails to respond to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

The Commission also explained the limited scope of its "failure to act" definition in its *Local Competition First Report and Order*[28] at paragraph 1285:

> Regarding what constitutes a state's "failure to act to carry out its responsibility under" section 252, the Commission was presented with numerous options. **The Commission will not take an expansive view of what constitutes a state's "failure to act."** Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. **This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).** The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. [Emphasis added].

[28] 11 FCCR 15499 (1996).

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Commission decisions limiting the scope of preemption have been consistent. These decisions make it abundantly clear that section 252(e)(5) preemption is not warranted where a party is dissatisfied with a state commission decision, or where a party claims the state commission has misinterpreted or misapplied the provisions of the Act in reaching its decision. Rather, preemption is only justified where a state commission refuses to undertake duties conferred on the state commission pursuant to section 252 of the Act.

One of the earliest FCC decisions reaching this conclusion was in CC Docket Nos. 97-163, 97-164 and 97-165, where the Commission examined preemption petitions filed by Low Tech Designs, Inc. ("Low Tech").[29] The Commission noted that decisions to divest state commissions of jurisdiction under section 252(e)(5) are narrowly construed, and are generally limited to a state commission's failure to timely respond to a request for mediation or arbitration. 13 FCC Rcd. 1755 at ¶ 5. Thus, the Commission concluded that a state commission decision to dismiss a petition for section

[29] *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois before the Illinois Commerce Commission (CC Docket No. 97-163), Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Bellsouth Before the Georgia Public Service Commission* (CC Docket No. 97-164), *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South before the Public Service Commission of South Carolina* (CC Docket No. 97-165), 13 FCC Rcd. 1755 (1997).

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

252 arbitration because the petitioner lacked standing under the Act was not a "failure to act" for preemption purposes. 13 FCC Rcd. 1755 at ¶ 33.[30]

In *Low Tech*, the Commission also noted that preemption is not triggered by allegations of incorrect or improper substantive decisions made by state commissions while undertaking section 252 responsibilities:

> "Because section 51.801 of our rules does not focus on the validity of state commission decisions, we do not see a basis under our rules for examining the underlying reasoning of state commission decisions."[31]

The Commission's decisions on the scope of section 252(e)(5) preemption since *Low Tech* have followed this theme. In CC Docket No. 99-154[32], the Commission found a preemption request unwarranted where the state commission issued its decision during the course of the FCC action:

> Even though the New Jersey Board "failed to act" within the nine month deadline imposed by section 252, we are now presented with a situation in which GNAPs [Global Naps] has asked the Commission to assume jurisdiction over an already completed state proceeding. The New Jersey Board's recent action has effectively mooted the need for Commission preemption of the New Jersey

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30 "[U]nder our current rules, a state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding."

31 13 FCC Rcd. 1755 at ¶ 36. *See also id.* at footnote 122: "LTD's argument appears to be essentially that a state commission has not acted until it has ruled on the merits of the issues raised in the arbitration petition. As discussed above, this argument does not provide a ground for preemption under our rules."

32 *In the Matter of Global Naps, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute With Bell Atlantic-New Jersey, Inc.*, 14 FCC Rcd. 12530 (1999).

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

> GNAPs/Bell Atlantic proceeding. While we have a duty to assume "responsibility" when a state commission "fails to act," after the New Jersey Board's July 12, 1999 final order, there is no further "responsibility" left for the Commission to assume. Principles of federal-state comity and efficiency lead us to question the merit of assuming jurisdiction over the completed state proceeding under the circumstances presented in this instance. This situation is roughly analogous to one in which a court declines to act on a matter pending resolution of proceedings before an administrative agency. "[P]ractical notions of judicial efficiency" have "a role to play when a court is confronted with a case the resolution of which could benefit from the prior conclusion of a related administrative proceeding." Just as a court must recognize existing agency action that will "render the complex fact pattern simple, or the lengthy proceeding short[,]" we recognize the practical efficiency of acknowledging the New Jersey Board's recent resolution of this proceeding. In doing so, we avoid a "situation[] which cr[ies] out for the elimination of duplication of efforts." [33]

The Commission also reiterated its message from *Low Tech* that it will not assume jurisdiction to examine the merits of a state commission's section 252 decision:

> [T]he Commission's decision not to preempt the jurisdiction of the New Jersey Board does not leave GNAPs without a remedy. **While GNAPs may prefer to attack the validity of the New Jersey Board's final order before this agency, we will not examine the substantive merits of that decision here.** Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court. Thus, GNAPs may still challenge the final New Jersey Board determination in federal district court pursuant to section 252(e)(6).[34] [Emphasis added].

The Commission's consistent application of the limited scope of state commission preemption has also been endorsed on appellate court review. In *Global*

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[33] 14 FCC Rcd. 12530 at ¶ 17.

[34] 14 FCC Rcd. 12530 at ¶ 20.

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ANCHORAGE, ALASKA 99501
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Naps, Inc. v. Federal Communications Comm'n, 291 F.3d 832 (D.C.Cir. 2002), the Circuit Court was asked to review the Commission's decision declining to preempt the jurisdiction of the Massachusetts Department of Telecommunication and Energy ("DTE").[35] The Commission had refused to preempt the DTE because the DTE's decision had been issued while the FCC petition was pending. 15 FCC Rcd. 4943 at ¶ 7 – 8.[36] Moreover, the Commission also reiterated its consistent interpretation of section 252(e)(5) of the Act and 47 C.F.R 51.801 that requests for preemption do not provide the Commission with jurisdiction to review the merits of state commission decisions. 15 FCC Rcd. 4943 at ¶ 9.[37]

On review, the Circuit Court agreed:

> We hold that the FCC's conclusion that § 252(e)(5) does not empower it to look behind a state agency's dismissal of a carrier's claim to evaluate the substantive validity of that dismissal is both a reasonable interpretation of that provision and consistent with the Commission's past practices and precedents. . . . It does not matter

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[35] 15 FCC Rcd. 4943 (2000).

[36] "[W]e deny GNAPs' Petition based upon the final action taken by the Massachusetts DTE on February 25, 2000 addressing the interconnection dispute between GNAPs and Bell Atlantic. . . . [W]e are confronted with a situation in which GNAPs has requested that this Commission assume jurisdiction over an already-completed state proceeding. The Massachusetts DTE's recent action has rendered moot the need for Commission preemption of the GNAPs/Bell Atlantic dispute. Since the release of the Massachusetts DTE's February 25, 2000 order, there is no longer a pending GNAPs/Bell Atlantic complaint proceeding before the DTE and no 'responsibility' left for the Commission to assume . . ."

[37] "As we concluded in a prior order under section 252(e)(5), however, 'section 51.801 of the Commission's rules does not focus on the validity of state commission decisions.' We therefore do not see a basis for examining the underlying reasoning of the Massachusetts DTE in determining that GNAPs' complaint is moot."

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
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> whether the state agency's position is correct on the merits. Rather, as the FCC found, what matters is that DTE did not fail to act, so the federal Commission has no basis upon which to preempt the regulatory authority of the state agency. GNAPs' remedy lies not in FCC preemption, but rather in judicial review of DTE's order, whether in federal or in state court.[38]
>
> . . .
>
> If a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by direct judicial review in the appropriate forum. And, in the present case, it does not matter whether DTE's decision to dismiss GNAPs' complaint as moot was reasonable.
>
> . . .
>
> In the Orders now on review, the FCC decided that it would not preempt an already completed state proceeding, at least where doing so would require the Commission to examine the underlying reasoning given by the state agency for terminating that proceeding. In so holding, the FCC has effectively construed § 252(e)(5) as not covering situations where a state agency affirmatively acts to dispose of a case, and in so doing at least purports to resolve the issues presented to it.[39]

ACS suggests that the *Starpower* order[40], represents an abandonment of the Commission's consistent practice of refusing to consider the merits of state commission decisions in evaluating a preemption request.[41] ACS is wrong.

In *Starpower*, the Commission was presented with the question whether state commission responsibilities under the act include the interpretation and

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38 291 F.3d at 833 – 834.

39 291 F.3d at 837.

40 15 FCCR 11277 (2000).

41 ACS Petition, at p. 40.

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

enforcement of interconnection agreements. The Virginia commission had expressly refused to become involved in such an interpretation/enforcement action and directed the parties to seek FCC relief. The Commission, after first concluding state commissions did have such responsibilities under the Act, viewed the Virginia commission's express refusal to become involved as a failure to act justifying preemption. [42] Thus, *Starpower* stands for the unremarkable proposition that where a state commission refuses to perform its section 252 duties, and tells the parties to bring their dispute to the FCC, such state commission inaction constitutes a "failure to act" for preemption purposes.[43] There is simply no parallel that can be drawn between the RCA's affirmative actions in its Anchorage and Fairbanks dockets and the Virginia commission's express inaction demonstrated in *Starpower*.

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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42 *Id.* at ¶s 6 – 7.

43 *Global Naps, Inc. v. FCC*, 291 F.3d 832, 839 (D.C.Cir. 2002)(noting that the facts in *Starpower* were consistent with a "failure to act" determination because the "Virginia commission refused to even consider Starpower's petition and, instead, encouraged the parties to seek relief from the FCC."). *See also, In the Matter of Petition of Worldcom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 FCCR 6224 (2001)(preempting the Virginia Commission after it expressly refused to arbitrate an interconnection dispute under the terms of the Act, telling the parties to seek relief with the FCC in order to do so).

B. The RCA Has Not "Failed to Act" in the Anchorage Docket

1. The Act's Timelines Do Not Apply to the Anchorage Proceeding

ACS does not attempt to argue that the RCA has "failed to act" within the Act's nine month deadline. This is because the current Anchorage proceedings do not involve a "new" request for negotiation or arbitration, but rather the modification of an existing arbitrated interconnection agreement previously approved by the APUC in January 1997.[44] Therefore, the timelines mandated by section 252 do not apply to the current Anchorage proceedings. Indeed, ACS candidly admitted this in proceedings before the RCA on December 6, 2000:

> CHAIR THOMPSON: If we're proceeding under the federal Act do any of the deadlines for approval of interconnection agreement or arbitration proceedings apply to this proceeding?
>
> MR. CALLAHAN[45]: In this case I don't think so. I think this is an anomaly because of the conditional approval of the interim prices. And I guess my view would be that we simply have an obligation to conform those prices to the Act expeditiously, but I -- but I believe other requirements of federal law would apply. I believe the Commissions -- for example, a determination by the Commission of prices would need to conform with federal Act requirements. I think under the language of the Act that would be a determination which the Act makes reviewable in federal court. I know there's a debate about sovereign immunity and the like, and those are other issues, but I think it would be a determination under federal law with respect to an arbitration agreement and would fall within the Act.

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44 Order U-96-89(9)(January 14, 1997).

45 Mr. Callahan was ACS' counsel in the Anchorage docket. Exhibit E, p. 1.

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

> But no, it doesn't clearly within a timing framework for a negotiation or arbitration. It's not a new negotiation or arbitration. It's fixing an existing agreement to make it conform to federal law. And it was implicit in the condition of approval of the '97 agreement.[46]

Because the Act's procedural timelines are inapplicable to the current Anchorage proceedings, there is no foundation upon which the Commission can conclude that the RCA has "failed to act." Neither the language of the Act, nor the Commission's regulations[47] or precedent supports any contrary conclusion.[48]

2. The RCA Has Been Diligently Processing the Anchorage Litigation

Notwithstanding the lack of any procedural deadline, the RCA has taken diligent action in the Anchorage docket. *See* Section IIA above. ACS' complaint that the RCA has not determined what cost model to use or scheduled a hearing to set final UNE loop rates[49] is simply incorrect.

ACS' complaint does not take into account the impact of RCA Order U-96-89(26), issued July 29, 2002.[50] In this order, the RCA selected ACS' proposed

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[46] Exhibit E, p. 5. ACS is estopped from arguing otherwise. *See, e.g. NextWave Personal Comm, Inc., Order on Reconsideration*, 15 FCC Rcd 17500, 17515 at ¶ 28 (2000).

[47] *See Local Competition First Report and Order*, 11 FCC Rcd. 15499 at ¶ 1285 and 47 C.F.R. §801(b).

[48] *See* discussion at Argument Section A above.

[49] *See* ACS Petition at p. 12, 21 - 22.

[50] An adjudicatory body, such as the RCA, must take great care in its deliberations and in the crafting of orders it issues. Although RCA Order U-96-89(26)

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

cost model for use and set up a two-phase procedural schedule to set final rates. The first meeting of the parties with the arbitrator to begin the scheduling process has already occurred.[51] Thus, ACS' procedural complaint is without merit.

Nor can ACS justifiably contend that the RCA has been dilatory. Interim loop rates were established in 1997, well within any statutory deadline.[52] ACS took no action to alter this status quo for three years, when in January 2000 it asked the RCA to establish a forward looking cost methodology. The RCA did so within six months of ACS' request.[53]

Again, in October 2000, ACS asked for changes to be made to this model. The RCA agreed to allow ACS to make its case for changes.[54] These proceedings commenced with briefing the RCA reviewed occurring during the same time the Supreme Court was considering the validity of the FCC's TELRIC principals. This process has now borne fruit. In order U-96-89(26), the RCA has agreed to use the cost model ACS proposed.

Given this procedural history, it is disingenuous for ACS to contend that the RCA has been dilatory. As the RCA noted in Order U-96-89(26), ACS has authored

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was filed five days after ACS filed its FCC Petition, it was substantively complete and in the final procedural stages of its creation before ACS' FCC filing.

51 This meeting was held August 5, 2002.

52 *See* Order U-96-89(9) issued January 14, 1997 following the initiation of proceedings under the Act on GCI's Petition filed July 29, 1996.

53 Order U-96-89(14), issued May 30, 2000.

54 Order U-96-89(15), issued January 8, 2001.

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

its own delays.[55] On this record, there is no basis for the FCC to conclude that the RCA has unreasonably "failed to act."

C. The RCA Has Not "Failed to Act" in the Fairbanks Dockets

ACS' complaint in the Fairbanks docket is two-pronged. First, it complains that the RCA misapplied or misinterpreted federal law in reaching its decision.[56] ACS does not assert that the RCA did not reach a timely decision or that it refused to perform its section 252 responsibilities. Rather, it complains it does not like the decision reached.

The second prong of ACS' argument is based on an estoppel theory. It argues that because the RCA asserted its Eleventh Amendment immunity in federal district court, the RCA has in some way waived its right to object to FCC preemption.[57] Both claims are baseless.

1. The RCA carried out its section 252 responsibilities.

The RCA issued a timely arbitration decision in the Fairbanks docket. GCI filed its arbitration petition on December 8, 1999. After a hearing, the RCA issued its decision approving the arbitrator's decision in part, and modifying it in part on August 24, 2000. Thus, the RCA "acted" and did so in a timely manner.

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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55 "We also note that the major delays in adopting new rates have been due, in part, to ACS-AN's advocacy of its model over our earlier decision to use the FCC model . . ." Order U-96-89(26) at p. 6, n. 13.

56 ACS Petition at pages 15 – 17, 32 – 36.

57 ACS Petition at 19 – 20, 41 – 42.

Nonetheless, ACS still suggests that the FCC should preempt the RCA by looking to the merits of the RCA's decision. ACS makes this leap by arguing that if a state commission's section 252 decision is at odds with federal law, such state action is the functional equivalent of a "failure to act" under section 252(e)(5).[58] In making this sweeping statement, ACS cites to a single FCC decision – *Starpower*. However, *Starpower* does not support ACS' claim because the *Starpower* decision was predicated on the Virginia's commissions express refusal to act.[59] This did not happen in the RCA's Fairbanks docket where the RCA issued a final decision.

Nor does ACS' citation to a section of the *Local Competition First Report and Order* support its argument.[60] Paragraph 739, quoted by ACS, is unremarkable because it notes that "review" of the FCC's pricing methodology is available. This paragraph speaks to *judicial* review of the FCC's pricing methodology.[61] It makes no mention of FCC review of state commission implementation of the FCC's pricing methodology. Moreover, even if ¶ 739's reference to "the Commission's pricing methodology" could somehow be construed to mean a state commission's determination

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58 *See* ACS Petition at p. 40 ("There is nothing in the language or legislative history of section 252(e)(5) to prevent the FCC from preempting state actions that clearly violate the pricing standards set forth in section 252(d)(1); ACS Petition at p. 43 ("The FCC has expressed its willingness to review cases in which the UNE pricing mechanism has failed, recognizing the possibility that the TELRIC pricing mechanism could have a confiscatory effect.")

59 *See* Argument Section IIA above.

60 *See* ACS Petition at p. 43.

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

rather than the FCC's, no different result occurs. Section 252(e)(5) preemption cannot be used to trump the express judicial review provisions of section 252(e)(6).[62] To do so would render the language of section 252(e)(6) meaningless.

ACS also does nothing to rebut the parade of FCC decisions beginning with *Low Tech* in 1997, which state again and again that FCC preemption under section 252(e)(5) is not used to review the merits of state commission section 252 decisions. Nor does ACS even mention that this FCC interpretation has been affirmed on federal appellate court review:

> The FCC's interpretation thus suggests that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option. Under this reading, the purpose of § 252(e)(5) is to hold out the FCC as an alternative forum for the adjudication of certain disputes related to interconnection agreements; the statute does not authorize the Commission to sit as an appellate tribunal to review the correctness of state resolution of such disputes. We believe that this understanding of the preemption provision is neither incompatible with congressional intent nor unreasonable. Instead, it seems quite faithful to the key statutory language: in this context, "fails to act" suggests incomplete action or no action, not misguided action.[63]

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61 This is what happened before the Eighth Circuit. *See Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part* 122 S.Ct.1646.

62 "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section."

63 *Global Naps, Inc.*, 291 F.3d at 837.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

The reasons the Commission and D.C. Circuit Court advanced for limiting preemption to a true "failure to act" are as true today as they were in each case cited above. Once the RCA issued its decision on the Fairbanks arbitrated interconnection agreement, there is "no longer a pending . . . complaint proceeding before the [RCA] left for the Commission to assume."[64] Moreover, "principles of federal-state comity and efficiency" are as applicable here as they were in the FCC's review of other preemption requests of completed state commission proceedings:

> "Just as a court must recognize existing agency action that will 'render the complex fact pattern simple, or the lengthy proceeding short[,]' we recognize the practical efficiency of acknowledging the New Jersey Board's recent resolution of this proceeding. In doing so, we avoid a 'situation[] which cr[ies] out for the elimination of duplication of efforts.'"[65]

The ACS' petition asks the Commission to do exactly what it has repeatedly said it would not – review the merits of the RCA's substantive decision. Under these circumstances, ACS' "remedy lies not in FCC preemption, but rather in judicial review of the [RCA's] order, whether in federal or in state court." *Global Naps, Inc.*, 291 F.3d at 834.

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[64] *In the Matter of Global Naps, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd. 4943 (2000) at ¶ 7 – 8 (2000).

[65] *In the Matter of Global Naps, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute With Bell Atlantic-New Jersey, Inc.*, 14 FCC Rcd. 12530 (1999) at ¶ 17.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

2. The RCA's Assertion of Sovereign Immunity Does Not Bar the RCA From Objecting to Preemption.

Although ACS claims the RCA has "waived" its right to object to preemption by asserting its sovereign immunity in federal court, it presents no analysis whatsoever explaining how such a "waiver" has been effected. Instead, ACS points to the *WorldCom Preemption Order* for support, where the Virginia Commission expressly refused to undertake any section 252 duty, and expressly directed the parties to petition the FCC for relief.[66]

In *WorldCom*, the FCC's focus for preemption purposes was on the Virginia Commission's refusal to act, not on the state commission's reasons for doing so:

> "[B]y insisting on arbitration pursuant to state law rather than the requirements of the Act, we find that the Virginia Commission has failed to act to carry out its responsibilities under section 252."[67]

At no place in *WorldCom* does the Commission suggest that any waiver or estoppel analysis was applicable to its preemption decision. Instead, the Commission did what it has previously done – review whether the state commission performed its section 252 duties.

In the GCI/ACS interconnection dispute, the RCA performed its section 252 duties.[68] There is simply no parallel here to *WorldCom* where the Virginia

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66 16 FCCR 6224 (2001) at ¶ 3.

67 *Id.* at ¶ 5.

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Commission refused to perform, and expressly directed the parties to seek relief from the FCC instead.[69]

Even if ACS had attempted to perform any realistic waiver or estoppel analysis, there is no basis for concluding such a bar exists.[70] "Equitable estoppel precludes a party from asserting a right he otherwise would possess but that he forfeits because of his conduct. The aggrieved party must have justifiably relied upon such conduct and changed his position so that he will suffer injury if the other is allowed to repudiate his conduct."[71]

ACS advances no evidence or argument whatsoever that it justifiably relied on the RCA not asserting its Eleventh Amendment immunity to subsequent federal court review. Nor can it do so because the RCA has never expressly agreed to waive its

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[68] ACS states at page 42 of its Petition that the RCA "appl[ied] its own rules in setting UNE rates instead of the Commission's rules." Unfortunately, ACS provides no description of any procedural federal laws not followed, thus, it is impossible for the RCA to respond to this unwarranted conclusory allegation. However, to the extent ACS is arguing here that the RCA's decision is at odds with federal law, preemption is inappropriate because the Commission does not exercise its preemption powers to review the merits of state commission section 252 decisions. *E.g. Global Naps,* 291 F.3d at 837 ("the statute does not authorize the Commission to sit as an appellate tribunal to review the correctness of state resolution of such disputes.")

[69] 16 FCCR 6224 at ¶ 3.

[70] ACS' failure to provide any authority or analysis on this issue should by itself bar relief. *E.g., In the Matter of Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd, 1131 at ¶44 (2002)(dismissing as meritless an estoppel claim advanced without any authority or legal analysis.); *In the Matter of AT&T Corp. v. Business Telecom, Inc.*, 2001 WL 575527 at ¶ 52 (2001)(concluding that an estoppel argument fails as a matter of law where the claim is advanced without any authority or legal analysis.)

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

sovereign immunity, and at the time the ACS federal court action was initiated,[72] numerous reported decisions existed where state commissions did the same thing as the RCA - asserted their Eleventh Amendment immunity defenses.[73]

ACS also offers no argument or evidence supporting any conclusion that it changed its position, or would have, if it had known the RCA would assert an immunity defense. Given the RCA's right to primary jurisdiction under the Act, and section 252(e)(4)'s bar on state court review, it would have been impossible for ACS to have done so.

ACS also does not attempt to provide any authority under the Act or under any scenario that could support any conclusion that a state asserting a constitutional immunity defense in federal court waives a procedural administrative right as a result. Given the magnitude of the constitutional right implicated, this default is not surprising.

State sovereign immunity under the Eleventh Amendment is a fundamental constitutional right.[74] The purpose of the Eleventh Amendment is to "prevent the indignity of subjecting a state to the coercive process of judicial tribunal at

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[71] *Communique Telecommunications, Inc., Declaratory Ruling and Order*, 10 FCC Rcd 10399at ¶ 30 (1995).

[72] Exhibit B, p. 1.

[73] The status of the law on this immunity issue at that time is described in the RCA's Motion to Dismiss, filed with the district court in Case No. A00-288 CV(HRH) on October 17, 2000.

[74] *Alden v. Maine*, 527 U.S. 706, 713 (1999).

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

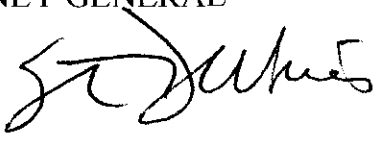
the instance of private parties."[75] And as this Commission has recognized, "[i]t is the federal court that would be required to determine its jurisdiction if and when it were faced with a state's assertion of Eleventh Amendment immunity during review of a state commission determination under section 252."[76] Thus, the RCA's after-the-fact assertion of its Eleventh Amendment immunity in federal court is a jurisdictional question for the federal courts to decide, and it has no bearing on the issue of whether the RCA "failed to act."

IV. Conclusion

For all of the above reasons, there is no basis for the FCC to preempt the RCA's jurisdiction under these circumstances. ACS' Petition should be denied.

Dated this 15th day of August, 2002, at Anchorage, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 

Steve DeVries
Assistant Attorney General
Alaska Bar No.: 8611105
Counsel for the Regulatory
Commission of Alaska

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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[75] *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993).

[76] *In the Matter of Global Naps, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd. 4943 (2000) at ¶ 10 (2000).

Kevin D. Callahan
Patton Boggs LLP
1031 W. 4th Avenue, Suite 504
Anchorage, Alaska 99501
Phone: (907) 277-4900
Fax: (907) 277-4117
Attorneys for Alaska
Communications Systems, Inc.

COPY

Tina M. Grovier
Elizabeth H. Ross
Birch, Horton, Bittner & Cherot
1127 W. 7th Avenue
Anchorage, Alaska 99501-3399
Phone: (907) 276-1550
Fax: (907) 276-3680

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ACS OF FAIRBANKS, INC., ACS OF ALASKA, INC. and ACS OF THE NORTHLAND, INC., Plaintiffs, vs. GCI COMMUNICATION CORP., d/b/a GENERAL COMMUNICATION, INC., COMMISSIONER G. NANETTE THOMPSON, COMMISSIONER BERNIE SMITH, COMMISSIONER PATRICIA M. DeMARCO, COMMISSIONER WILL ABBOTT, and COMMISSIONER JAMES S. STRANDBERG, Defendants.	Case No. A-00-288-CIV (JKS)

NOTICE OF DISMISSAL PURSUANT TO FED. R. CIV. P. 41(a)

PATTON BOGGS LLP
Law Offices
1031 West 4th Avenue
Suite 504
Anchorage, AK 99501
(907) 277-4900

Exhibit No. A
Page 1 of 3

Plaintiffs ACS of Fairbanks, Inc., ACS of Alaska, Inc., and ACS of the Northland, Inc., pursuant to Federal Rule of Civil Procedure 41(a)[1], hereby dismiss without prejudice Defendants Commissioner G. Nanette Thompson, Commissioner Bernie Smith, Commissioner Patricia M. Demarco, Commissioner Will Abbott, and Commissioner James S. Strandberg.

Dated this 1st day of December 2000, in Anchorage, Alaska.

PATTON BOGGS LLP

By: _____
Kevin D. Callahan
Alaska Bar No.: 8411103

[1] This Notice of Dismissal is self-executing and without prejudice to the Plaintiffs' right to commence another action for the same cause against the same Defendants. The Ninth Circuit has repeatedly affirmed these principles:

> Under Rule 41(a)(1), a plaintiff has an absolute right voluntarily to dismiss his action prior to service by the defendant of an answer or a motion for summary judgment. Hamilton v. Shearson-Lehman American Express, Inc., 813 F.2d 1532, 1534 (9th Cir. 1987). Even if the defendant has filed a motion to dismiss, the plaintiff may terminate his action voluntarily by filing a notice of dismissal under Rule 41(a)(1). Miller v. Reddin, 422 F.2d 1264, 1265 (9th Cir. 1970). The dismissal is effective on filing and no court order is required. Id. The plaintiff may dismiss either some or all of the defendants – or some or all of his claims – through a Rule 41(a)(1) notice. Pedrina v. Chun, 987 F.2d 608, 609 (9th Cir. 1993). Filing a notice of voluntary dismissal with the court automatically terminates the action as to the defendants who are the subjects of the notice. Unless otherwise stated, the dismissal is ordinarily without prejudice to the plaintiff's right to commence another action for the same cause against the same defendants. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 934-935 (9th Cir. 1987); see 5 Moor's Federal Practice ¶ 41.02[2]. Such a dismissal leaves the parties as though no action had been brought. Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991).

Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995); See also Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1999).

PATTON BOGGS LLP
Law Offices
1031 West 4th Avenue
Suite 504
Anchorage, AK 99501
(907) 277-4900

BIRCH, HORTON, BITTNER & CHEROT

By: _____
Tina M. Grovier
Alaska Bar No.: 9411088

Attorneys for ACS of Fairbanks, Inc.; ACS of Alaska, Inc.; and ACS of the Northland, Inc.

CERTIFICATION OF SERVICE:
I certify that on December 15, 2000, a copy of the foregoing was served by US Mail on the following:

Martin M. Weinstein, Esq.
Mark A. Moderow, Esq.
Corporate Counsel
General Communications, Inc.
2550 Denali Street, Suite 1000
Anchorage, Alaska 99503

Tina M. Grovier
Elizabeth H. Ross
Birch, Horton, Bittner & Cherot
1128 W. 7th Avenue
Anchorage, Alaska 99501

Jeffery Landry
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Bruce M. Botelho
Attorney General
State of Alaska
PO Box 1130
Juneau, AK 99811-0300

_____
Suzanne R. Hahn, Legal Secretary

PATTON BOGGS LLP
Law Offices
1031 West 4th Avenue
Suite 504
Anchorage, AK 99501
(907) 277-4900

Kevin D. Callahan
Patton Boggs LLP
1031 W. 4th Avenue, Suite 504
Anchorage, Alaska 99501
Phone: (907) 277-4900
Fax: (907) 277-4117
Attorneys for Alaska
Communications Systems, Inc.

Tina M. Grovier
Elizabeth H. Ross
Birch, Horton, Bittner & Cherot
1127 W. 7th Avenue
Anchorage, Alaska 99501-3399
Phone: (907) 276-1550
Fax: (907) 276-3680

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ACS OF FAIRBANKS, INC.,
ACS OF ALASKA, INC. and
ACS OF THE NORTHLAND, INC.,

Plaintiffs,

vs.

GCI COMMUNICATION CORP.,
d/b/a GENERAL COMMUNICATION,
INC., REGULATORY COMMISSION
OF ALASKA, COMMISSIONER G.
NANETTE THOMPSON,
COMMISSIONER BERNIE SMITH,
COMMISSIONER PATRICIA M.
DeMARCO, COMMISSIONER WILL
ABBOTT, and COMMISSIONER
JAMES S. STRANDBERG,

Defendants.

Case No. A00-____ CV (____)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION
(47 U.S.C. § 252(e)(6), 28 U.S.C. 2201)

PATTON BOGGS
LLP
Law Offices
. West 4th Avenue
Suite 504
Anchorage, AK 99501
(907) 277-4900

Plaintiffs ACS of Fairbanks, Inc. (ACS-F), ACS of Alaska, Inc. (ACS-AK), and ACS of the Northland, Inc. (ACS-N), collectively referred to as "ACS", for their complaint allege and state as follows:

PARTIES AND JURISDICTION

1. Plaintiffs ACS-F, ACS-AK, and ACS-N, are Alaska corporations in good standing and are certificated by the Regulatory Commission of Alaska to provide local telecommunications services in Fairbanks, Juneau, and North Pole, respectively. Plaintiffs are incumbent local exchange carriers (ILECs) as defined by the Telecommunication Act of 1996 ("the Act"), 47 U.S.C. § 251(h). Plaintiffs are fully qualified to maintain this action.

2. Defendant GCI Communication Corp. (GCI), an Alaska corporation, wishes to provide local telecommunications services in Juneau, Fairbanks, and North Pole. GCI is a competitive local exchange carrier (CLEC).

3. Defendant Regulatory Commission of Alaska (Commission), is a state agency which administers the regulation of rates, services and facilities of communications common carriers, as provided by AS 42.04.100.

4. Defendants G. Nanette Thompson, Bernie Smith, Patricia M. DeMarco, Will Abbott, and James S. Strandberg are Commissioners serving on the Commission, pursuant to AS 42.04.020.

PATTON BOGGS LLP
Law Offices
. West 4th Avenue
suite 504
Anchorage, AK 99501
(907) 277-4900

Exhibit No. B
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5. This Court has jurisdiction of this action pursuant to 47 U.S.C. § 252(e)(6) of the Telecommunications Act of 1996 (the "Act") and the Declaratory Judgment Act, 28 U.S.C. § 2201.

INTRODUCTION

6. In this action, ACS seeks judicial review of the Commission's decisions concerning an interconnection agreement between ACS and GCI. The Telecommunications Act of 1996 requires ILECs to share their networks with competitors in order to promote competition in the local telephone exchange market. 47 U.S.C. § 251. GCI requested interconnection with ACS, and following unsuccessful negotiations, filed a Petition for Arbitration before the Commission. 47 U.S.C. § 252(b). The Commission appointed an Arbitrator to make recommendations to the Commission on the terms and conditions to be included in an interconnection agreement.

7. 47 C.F.R. 51.505(b)(1) requires that, regardless of the ILEC's (ACS) actual network to be used by the competitor (GCI), costs must be based on a theoretical network using the most efficient technology available and the lowest cost network configuration. To establish the prices to be charged to GCI for services, network elements and interconnection with ACS, the Commission ordered the parties to use a computerized model developed by the Federal Communications Commission (FCC). The Commission's Order adopting the Arbitrator's decisions results in the Model generating confiscatory rates for the advanced services and functions GCI will receive under the interconnection agreement.

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(907) 277-4900

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8. The Eighth Circuit Court of Appeals, having exclusive jurisdiction under the Hobbs Act, 28 U.S.C. § 2342; 47 U.S.C. § 402(a), for determining the validity of 47 C.F.R. 505(b)(1), invalidated the regulation on July 18, 2000. *Iowa Utilities Board v. Federal Communications Commission*, 2000 WL 979117 (July 18, 2000). The Commission ignored this controlling authority when, on August 24, 2000, it adopted all but one of the Arbitrator's rulings. ACS now seeks judicial review of the Commission's decisions requiring the use of the FCC Model and adopting the Arbitrator's rulings, as set forth below.

THE COMMISSION'S SELECTION OF A COST MODEL

9. Pursuant to 47 U.S.C. § 251, GCI demanded interconnection with ACS' facilities and equipment, and miscellaneous services and network elements from ACS. Rural telephone companies, which include ACS-F, ACS-AK and ACS-N, are exempt from the duty to interconnect with competitors until the Commission determines that a request for interconnection, services, or network elements is "not unduly economically burdensome" 47 U.S.C. § 251(f). In previously terminating the rural exemption for these companies, the Commission stated that it would review the prices to be established for network elements to be used for interconnection to "insure that the burdens borne by the incumbent carrier in a market where local competition is newly introduced are not great." *In Re the Matter of the Petition by GCI Communication Corp. d/b/a General Communication, Inc. and d/b/a GCI for Termination of the Rural Exemption and Arbitration with PTI Communications of Alaska, Inc. Under 47 U.S.C. §§ 251 and 252*

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Law Offices
West 4th Avenue
Suite 504
Anchorage, AK 99501
(907) 277-4900

for the Purpose of Instituting Local Exchange Competition, Consolidated Docket No. U-97-82, U-97-143, U-97-144(11) (October 11, 1999) at p. 12.

10. Following unsuccessful negotiations for an interconnection agreement, on December 8, 1999, GCI petitioned the Commission for arbitration in accordance with the Act, 47 U.S.C. § 252(b)(1).

11. On January 27, 2000, the Commission appointed an Arbitrator to conduct the arbitration, and to make recommended decisions to the Commission. The Commission issued an order on August 24, 2000, approving in part, and modifying in part, the Arbitrator's recommendations. A copy of the Commission's order is attached as Exhibit A.

12. 47 U.S.C. § 252(d)(1) requires that the rates charged by ACS for interconnection of facilities and equipment be based on the cost ACS incurs in providing the interconnection or network element, and that such charges be just, reasonable, nondiscriminatory, and may include a reasonable profit.

13. The Federal Communications Commission (FCC) has promulgated certain regulations implementing these requirements. The FCC's regulations require that the cost of interconnection be determined on a "forward-looking" basis, according to a methodology referred as "TELRIC" (total element long run incremental cost).

14. In conformance with the pricing requirements of the Act, ACS developed a computerized economic cost study to generate rates based on the actual forward-looking costs ACS will incur. Pursuant to 47 C.F.R. 505(e), ACS submitted its cost study in

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West 4th Avenue
...ite 504
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response to GCI's Petition for Arbitration. On January 27, 2000, the RCA advised the parties of its determination to use a single model or methodology to determine forward-looking costs. The Commission solicited proposals from ACS and GCI as to the appropriate methodology for establishing rates for the interconnection, services and network elements to be provided by ACS to GCI.

15. On April 18, 2000, the Commission ordered that rates be established through use of a computer model developed by the FCC in the context of universal service funding ("USF"). USF is governed by a different section of the Act (§ 254) than the provisions controlling interconnection (§§ 251 and 252), has different legal requirements, and serves a different purpose: the distribution of federal support funding to facilitate basic telephone services in high cost areas by equalizing costs nationwide, not to price interconnection and network elements providing the advanced, sophisticated services and functions ACS is required to provide GCI under the interconnection agreement.

16. The FCC model (referred to as the "Synthesis Model") establishes rates based on the hypothetical network of a hypothetical carrier. In order for the Model to generate rates for the hypothetical network, cost and other data for various components of a network must be "inputted" into the Model. The FCC has established default values for these "inputs," based in some instances on nationally-averaged information from Lower '48 non-rural companies. In other instances, the FCC did not explain how the default inputs were developed. The FCC default inputs do not reflect ACS' actual network or its actual costs in providing interconnection and network elements to GCI.

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17. The Commission's rejection of ACS' forward-looking economic cost study and its order requiring that prices be established through the use of the FCC Synthesis Model is unduly economically burdensome, and therefore does not meet the requirements of, is contrary to, and violates the Act, including but not limited to, 47 U.S.C. 251(f).

18. The Commission's rejection of ACS' forward-looking economic cost study, and its order requiring that the prices be established through use of the FCC Synthesis Model, does not meet the requirements of, is contrary to, and violates the Act, including but not limited to, 47 U.S.C. § 252(d)(1), because the Model generates rates that are confiscatory, unjust, unreasonable and do not adequately and fairly compensate ACS for its actual costs.

19. The Commission's rejection of ACS' forward-looking economic cost study, and its order requiring that the prices be established through use of the FCC Synthesis Model, is arbitrary and capricious, and constitutes an abuse of discretion.

20. The Commission's rejection of ACS' forward-looking economic cost study, and its order requiring that the prices be established through use of the FCC Synthesis Model, is a violation of ACS' right to substantive due process, and results in an unconstitutional taking because the rates generated by the FCC Synthesis do not adequately and fairly compensate ACS.

21. The Commission's rejection ACS' forward-looking economic cost study, and its order requiring that the prices be established through use of the FCC Synthesis Model,

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violates ACS' right to procedural due process because in selecting the Model as a methodology, the Commission did not engage in rulemaking as required by Alaska law.

INPUT DECISIONS

22. After the evidentiary hearing was concluded, the Arbitrator ruled that, regardless of ACS' actual costs, the FCC's default inputs must be accepted unless ACS proved that its costs are "reflective of a theoretical least cost, efficient competitive carrier determined by nationwide averaging," and further ruled that ACS had not meet this burden. This previously unannounced evidentiary burden violated ACS' right to due process and the Commission's Order dated April 18, 2000.

23. The Commission approved the Arbitrator's decisions on the following Model Inputs, even though those decisions failed to award ACS the actual forward-looking costs ACS will incur in providing interconnection and network elements to GCI:

a. Fill Factors
b. Plant Mix
c. Gauge of Copper for Distribution Cable
d. Digital Loop Carrier (DLC)
e. Serving Area Interfaces (SAI)
f. Network Interface Device (NID)
g. Duct Cost per Kilofoot
h. Drop Cost per Kilofeet
i. Drop Terminal
j. Manhole Costs
k. Switching Costs
l. Common Support Service Expenses
m. Cost of Capital
n. Expense to Investment Ratio

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24. The Commission's adoption of the Arbitrator's decision on Model Inputs does not meet the requirements of, is contrary to, and violates the Act, including but not limited to, 47 U.S.C. § 252(d)(1).

25. The Commission's adoption of the Arbitrator's decision on Model Inputs violated ACS' right to procedural and substantive due process because ACS was never informed prior to the Arbitrator's decision that it would be required to prove that its proposed inputs to the Model reflected the costs incurred by a more efficient carrier than the hypothetical company which the FCC used to develop its default inputs.

26. The Commission's adoption of the Arbitrator's decision on Model Inputs violates ACS' constitutional right to procedural and substantive due process because the Arbitrator imposed an unfair and impossible burden on ACS to disprove the validity of the FCC default inputs when it could not be determined what the FCC used as a factual basis to develop those inputs, and the hypothetical carrier does not exist.

27. The Commission's adoption of the Arbitrator's decision on Model Inputs does not meet the requirements of, is contrary to, and violates the Act, including but not limited to, 47 U.S.C. 251(f) because the prices established through the FCC default inputs are unduly economically burdensome to ACS.

28. The Commission's adoption of the Arbitrator's decision on Model Inputs is arbitrary and capricious, and constitutes an abuse of discretion.

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QUALITY OF SERVICE / PERFORMANCE STANDARDS AND PENALTY PROVISIONS

29. 47 U.S.C. 251(c)(2)(C) requires ACS to provide interconnection that is at least equal in quality or at "parity" to that provided by ACS to itself. GCI demanded that the interconnection agreement provide specific reporting, monitoring and performance standards which exceeded the quality of service and standards ACS provides to itself, thereby granting GCI "parity plus." GCI's proposed standards also exceeded the performance standards applicable to telecommunications carriers as established by Alaska statute and regulations, 3 AAC 52.200 *et.seq.*

30. The Arbitration procedure established by the Commission in its Order dated January 27, 2000, required the parties to present evidence, and then to make "final pitches" or offers on each issue. The Arbitrator was required to select one party's offer, without modification or alteration of the offer. This process is referred to as "baseball" style arbitration.

31. ACS was not informed of the specific standards GCI intended to pitch to the Arbitrator until the parties finished presenting their evidence, and therefore, ACS could not present evidence on the cost it will incur in complying with GCI's proposed standards. After the Arbitrator ruled on the specific GCI standards to be incorporated into the interconnection agreement, ACS requested that it be allowed to supplement its final offer in order to request recovery of the actual costs which ACS would incur for

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compliance with the specific standards adopted by the Arbitrator. The Arbitrator denied ACS' request.

32. The Commission approved the Arbitrator's decision ruling that the interconnection agreement must contain performance standards governing OSS, installation, service, maintenance, and repair of ACS' network. The Commission also approved the Arbitrator's decisions to adopt GCI's specific performance standards which vary from the performance standards applicable to Alaska telecommunications carriers pursuant to Alaska statute and regulation, and that penalties be included in the interconnection agreement for failure to meet the performance standards.

33. The Commission's approval of the Arbitrator's decision to adopt specific performance standards and penalties does not meet the requirements of, is contrary to, and violates the Act.

34. The Commission's approval of the Arbitrator's decision to adopt specific performance standards and penalties is discriminatory, arbitrary and capricious, and constitutes an abuse of discretion.

35. The Commission's approval of the Arbitrator's decision to adopt specific performance standards and penalties by including them in an interconnection agreement, rather than by rulemaking, violates the Alaska Administrative Procedure Act, and ACS' constitutional right to procedural and substantive due process.

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36. The Commission's approval of the Arbitrator's decision denying ACS the right to present evidence of the actual costs ACS will incur in complying with the standards adopted by the Arbitrator results in an unconstitutional taking of ACS' property.

37. The Commission's approval of the Arbitrator's decision denying ACS the right to present evidence of the actual costs ACS will incur in complying with the standards adopted by the Arbitrator violated ACS' constitutional right to procedural and substantive due process.

WHOLESALE LINE TESTING

38. The Commission adopted the Arbitrator's decision allowing GCI access to ACS' Harris Line Test System when GCI leases wholesale circuits from ACS.

39. The Commission's adoption of the Arbitrator's decision to grant GCI access to ACS' Harris Line Test System does not meet the requirements of, is contrary to, and violates the Act.

40. The Commission's adoption of the Arbitrator's decision to allow GCI access to ACS' Harris Line Test System is arbitrary and capricious, and constitutes an abuse of discretion.

DARK FIBER

41. Dark fiber is fiber optic cable which is not being used. The Arbitrator accepted GCI's final offer as to the price of dark fiber, even though that offer wrongly assumes the amount of capacity, or fill factor, which ACS deploys in its network on a forward-looking basis.

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42. The Commission's adoption of the Arbitrator's decision on dark fiber does not meet the requirements of, is contrary to, and violates the Act, including but not limited to, 47 U.S.C. 252(d)(1).

43. The Commission's adoption of the Arbitrator's decision on dark fiber is arbitrary and capricious, and constitutes and abuse of discretion.

NONRECURRING COSTS

44. Nonrecurring costs are those costs incurred by ACS in performing preordering, ordering, provisioning, maintenance, repair and billing activities associated with the services and network elements purchased by GCI. The FCC Synthesis Model does not generate rates for nonrecurring costs. ACS proposed that nonrecurring rates be established based on ACS' actual cost to provide these functions. Late in the arbitration process, and without submission to the Commission for approval of a new costing methodology, GCI purposed a Non-Recurring Cost Model (NRCM) which generates rates based on a hypothetical electronic system that assumes idealized efficiencies for much larger, non-rural Regional Bell companies, rather then the network and systems actually deployed by ACS.

45. The Commission approved the Arbitrator's decision selecting the NRCM Model, although ACS did not have proper notice that GCI intended to use the model in the course of this arbitration, and the model assumes an electronic system which does not yet exist.

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: 504
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(907) 277-4900

46. The Commission's adoption of the Arbitrator's decision to use the NRCM Model and to accept the rates generated from that model as purposed by GCI, does not meet the requirements of the Act, including but not limited to, 47 U.S.C. § 252(d)(1).

47. The Commission's adoption of the Arbitrator's decision to use the NRCM Model and to accept the rates generated from that model as purposed by GCI, is arbitrary and capricious, and constitutes an abuse of discretion.

48. The Commission's adoption of the Arbitrator's decision to use the NRCM Model and to accept the rates generated from that model as purposed by GCI is a violation of the Alaska Administrative Procedures Act, and ACS' right to procedural and substantive due process.

49. The Commission's adoption of the Arbitrator's decision to use the NRCM Model and to accept the rates generated from that Model as proposed by GCI results in an unconstitutional taking of ACS' property.

THE COMMISSION HAS NO CURRENT JURISDICTION TO IMPOSE A FINAL, BINDING AGREEMENT ON ACS

50. 47 U.S.C. § 252(b)(4)(C) mandates that the Commission shall conclude resolution of any unresolved issues not later then 9 months after the date on which the local exchange carrier (here, ACS) received the request for interconnection. The statutory deadline in this case expired on August 24, 2000, but the Commission has not yet entered a final order approving the signed, arbitrated interconnection agreement between the parties. The Commission is now without jurisdiction to do so, and therefore

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504
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the Arbitration agreement does not meet the requirements of, is contrary to, and violates the Act.

REQUESTED RELIEF

Wherefore, Plaintiffs ACS of Fairbanks, Inc., ACS of Alaska, Inc., and ACS of the Northland, Inc. request the following relief:

1. that the Court enter a declaratory judgment ruling that the Commission's decisions as set forth with more particularity above, does not meet the requirements of the Telecommunications Act of 1996;

2. that the Court enter a declaratory judgment finding that the Commission's decisions as set forth more particularly above, is arbitrary and capricious, and constitutes an abuse of discretion;

3. that the Court enter a declaratory judgment finding that the Commission's decisions as set forth with more particularity above, violate ACS' right to procedural and substantive due process;

4. that the Court enter a declaratory judgment finding that the Commission's decisions as set forth with more particularity above, results in rates that are confiscatory, and is an unconstitutional taking of ACS' property;

5. that the Court enter a declaratory judgment that the Commission is without jurisdiction to take further action and therefore, the interconnection agreement between ACS and GCI is unenforceable, or alternatively, that it be modified, consistent with the Court's findings;

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6. that the Court enter an injunction against the Defendants Regulatory Commission of Alaska and Commissioners G. Nanette Thompson, Bernie Smith, Patricia M. DeMarco, Will Abbott and James S. Strandberg, personally and individually, to enjoin these defendants from imposing on ACS such unlawful terms and conditions as found by the Court pursuant to the Court's entry of the declaratory judgments requested above, and that these Defendants be prospectively prohibited from continuing violations of federal law and ACS' constitutional rights;

7. that the Court award ACS its costs and attorney's fees;

8. for such other and further relief as this Court deems proper and just.

Dated this day 25th of September 2000, in Anchorage, Alaska.

PATTON BOGGS LLP

By: _____
Kevin D. Callahan
Alaska Bar No.: 8411103

BIRCH, HORTON, BITTNER & CHEROT

By: _____
Tina M. Grovier
Alaska Bar No.: 9411088

Attorneys for ACS of Fairbanks, Inc.; ACS of Alaska, Inc.; and ACS of the Northland, Inc.

PATTON BOGGS LLP
Law Offices
West 4th Avenue
504
Anchorage, AK 99501
(907) 277-4900

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOCATION OF HEARING FOR SEPTEMBER CALENDAR:

U.S. Court of Appeals - 9th Circuit
Park Place Building
1200 Sixth Avenue
Seattle, Washington 98101

Date of Notice:

July 16, 2002

COUNSEL WILL PLEASE CHECK-IN WITH THE DEPUTY IN THE COURTROOM
All CJA Counsel call (415) 556-9834 for travel authorization

Monday, September 30, 2002 1:30 p.m. Courtroom at Park Place, 21st Floor

( ) 01-35344/35475 ACS of Fairbanks v. GCI Comm.

Maximum argument time 20 minutes per side

Please return the enclosed Acknowledgment of Hearing Notice to the
Seattle Clerk's Office 1010 Fifth Ave., Rm 811, Seattle, WA 98104

www.ca9.uscourts.gov

Exhibit No. C
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SENATE CS FOR CS FOR HOUSE BILL NO. 3001(JUD) am S

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - THIRD SPECIAL SESSION

BY THE SENATE JUDICIARY COMMITTEE

Amended: 6/26/02
Offered: 6/26/02

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the powers and duties of the Regulatory Commission of Alaska, establishing a task force to inquire into the operation of the commission, and extending the termination date of the commission to June 30, 2003; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 42.04.010(b) is amended to read:

(b) **The commission shall annually elect** [WHEN A VACANCY OCCURS IN THE OFFICE OF CHAIR, THE COMMISSION MAY NOMINATE] one of its members to serve as chair **for the following fiscal year**. When a vacancy occurs in the office of chair, the **commission shall elect one of its members to serve the remaining term as chair** [GOVERNOR SHALL DESIGNATE THE CHAIR OF THE COMMISSION, EITHER BY SELECTING THE MEMBER NOMINATED BY THE COMMISSION OR ANOTHER MEMBER]. The term as chair is **one year** [FOUR YEARS]. The chair may [NOT] be **elected** [APPOINTED] to **not more than**

three successive terms as chair. **After a year of not serving as chair, the commissioner is eligible for election as chair again.**

* **Sec. 2.** AS 42.04 is amended by adding a new section to article 1 to read:

Sec. 42.04.090. Impartial decision-making. (a) A hearing panel and each member of the hearing panel shall accord to a person the right to be heard according to law. A member of a hearing panel may not initiate, permit, or consider an ex parte communication or other communication made to the member of a hearing panel outside the presence of the parties concerning a matter that is pending or likely to come before the panel except as allowed by this section.

(b) A hearing panel and each member of the hearing panel may initiate or consider an ex parte communication when expressly authorized by law to do so.

(c) When circumstances require, a hearing panel and each member of the hearing panel may engage in ex parte communications for scheduling or other administrative purposes if (1) the communications do not deal with substantive matters or the merits of the issues litigated; (2) each member of the hearing panel reasonably believes no party will gain a procedural or tactical advantage because the communication is ex parte; and (3) the hearing panel takes reasonable steps to notify all parties promptly of the substance of the ex parte communication and, when practicable, allows them an opportunity to respond. This subsection does not apply to ex parte communications by commission staff concerning scheduling or administrative matters.

(d) If the parties agree to this procedure beforehand, either in writing or on the record, a hearing panel and each member of the hearing panel may engage in ex parte communications on specified administrative topics with one or more parties.

(e) A hearing panel and each member of the hearing panel may consult other members of the panel and commission staff whose function is to aid the hearing panel in carrying out its adjudicative responsibilities.

(f) A hearing panel and each member of the hearing panel may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the hearing panel.

(g) In all activities, a member of a hearing panel shall avoid impropriety and

the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the hearing process.

* **Sec. 3.** AS 42.05 is amended by adding a new section to read:

Sec. 42.05.175. Timelines for issuance of final orders. (a) The commission shall issue a final order not later than six months after a complete application is filed for an application

(1) for a certificate of public convenience and necessity;

(2) to amend a certificate of public convenience and necessity;

(3) to transfer a certificate of public convenience and necessity; and

(4) to acquire a controlling interest in a certificated public utility.

(b) Notwithstanding a suspension ordered under AS 42.05.421, the commission shall issue a final order not later than nine months after a complete tariff filing is made for a tariff filing that does not change the utility's revenue requirement or rate design.

(c) Notwithstanding a suspension ordered under AS 42.05.421, the commission shall issue a final order not later than 15 months after a complete tariff filing is made for a tariff filing that changes the utility's revenue requirement or rate design.

(d) The commission shall issue a final order not later than 12 months after a complete formal complaint is filed against a utility or, when the commission initiates a formal investigation of a utility without the filing of a complete formal complaint, not later than 12 months after the order initiating the formal investigation is issued.

(e) The commission shall issue a final order in a rule making proceeding not later than 24 months after a complete petition for adoption, amendment, or repeal of a regulation under AS 44.62.180 - 44.62.290 is filed or, when the commission initiates a rule making docket, not later than 24 months after the order initiating the proceeding is issued.

(f) The commission may extend a timeline required under (a) - (e) of this section if all parties of record consent to the extension or if, for one time only, before the timeline expires, the

(1) commission reasonably finds that good cause exists to extend the

timeline;

(2) commission issues a written order extending the timeline and setting out its findings regarding good cause; and

(3) the extension of time is 90 days or less.

(g) The commission shall file quarterly reports with the Legislative Budget and Audit Committee identifying all extensions ordered under (f) of this section during the previous quarter and including copies of the written orders issued under (f)(2) of this section.

(h) If the commission does not issue and serve a final order regarding an application or suspended tariff under section (a), (b), or (c) of this section within the applicable timeline specified, and if the commission does not extend the timeline in accordance with (f) of this section, the application or suspended tariff filing shall be considered approved and shall go into effect immediately.

(i) For purposes of this section, "final order" means a dispositive administrative order that resolves all matters at issue and that may be the basis for a petition for reconsideration or request for judicial review.

(j) For purposes of this section, an application, tariff filing, formal complaint, or petition is complete if it complies with the filing, format, and content requirements established by statute, regulation, and forms adopted by the commission under regulation.

* **Sec. 4.** AS 42.05.191 is amended to read:

Sec. 42.05.191. Contents and service of orders. Every formal order of the commission shall be based upon the facts of record. **However, the commission may, without a hearing, issue an order approving any settlement supported by all the parties of record in a proceeding, including a compromise settlement.** Every order entered pursuant to a hearing must state the commission's findings, the basis of its findings and conclusions, together with its decision. These orders shall be entered of record and a copy of them shall be served on all parties of record in the proceeding.

* **Sec. 5.** AS 44.66.010(a)(4) is amended to read:

(4) Regulatory Commission of Alaska (AS 42.04.010) -- June 30, **2003** [2002];

* **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICATION OF TIMELINES TO NEW AND EXISTING DOCKETS. The timelines provided in AS 42.05.175, added by sec. 3 of this Act, apply to all dockets of the Regulatory Commission of Alaska filed on or after July 1, 2002. For dockets commenced before July 1, 2002, the date of July 1, 2002, shall be used as the date of filing for the purpose of applying the timelines in AS 42.05.175.

* **Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TASK FORCE INQUIRY INTO REGULATORY COMMISSION OF ALASKA. (a) A task force is established to inquire into the operation of the Regulatory Commission of Alaska. The members of the task force shall be appointed as follows: three people by the president of the senate, three people by the speaker of the house of representatives, and one person by the governor.

(b) The task force shall immediately perform a comprehensive review of the commission and its operations. The task force shall present a written report to the legislature not later than January 30, 2003. The task force is terminated upon the presentation of the written report to the legislature. The task force shall make specific recommendations in its report advising the legislature regarding

(1) the type of arbitration best suited to rate and tariff issues;

(2) the appropriate level of regulation of the electric and telephone cooperatives organized under AS 10.25 and the appropriate level of regulation of municipally owned utilities;

(3) whether a separate telecommunications commission should be created.

(c) The task force shall have access to all information in the custody of the commission; however, information categorized as confidential shall be available to the task force only with the consent of the submitter of the information. The task force shall maintain the confidentiality of any confidential information accessed. Confidential information may not be disclosed in the written report prepared under (b) of this section.

(d) A request for information that might reasonably be considered to contain confidential information may be made only with a majority vote of the members of the task

force. The members of the task force may not improperly use or disclose any information obtained in the course of service on the task force. The provisions of AS 39.52.140 apply to members of the task force. The governor, in place of the personnel board, shall apply the penalty provisions of AS 39.52.440 - 39.52.460.

* **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

POWERS AND DUTIES OF REGULATORY COMMISSION OF ALASKA IN THE YEAR AFTER EXPIRATION. Notwithstanding AS 44.66.010(b), the powers and duties of the Regulatory Commission of Alaska in the year following expiration are not reduced or otherwise limited, and the commission shall continue in existence after expiration for one year. The commission shall continue to exercise all its powers and perform its duties and responsibilities under AS 42 during the year following its expiration.

* **Sec. 9.** Except as provided in sec. 11, this Act takes effect immediately under AS 01.10.070(c).

* **Sec. 10.** AS 42.04.090 added by sec. 2 of this Act is repealed on June 30, 2004.

* **Sec. 11.** Section 1 of this Act takes effect January 15, 2003.

STATE OF ALASKA

REGULATORY COMMISSION OF ALASKA

Before Commissioners: G. Nanette Thompson, Chair
Bernie Smith
Patricia M. DeMarco
Will Abbott
James S. Strandberg

In the Matter of the Petition of)
GCI COMMUNICATIONS CORP. for)
Arbitration Under Section 252 of the) U-96-89
Communications Act of 1996 with the)
MUNICIPALITY OF ANCHORAGE a/k/a ATU)
TELECOMMUNICATIONS for the Purpose of)
Instituting Local Exchange Competition)
)

REGULATORY COMMISSION OF ALASKA
1016 West Sixth Avenue, Suite 305
Anchorage, Alaska

PHASE II
VOLUME II
ORAL ARGUMENT

December 6, 2000
8:30 o'clock a.m.

BEFORE: PAUL OLSON, ARBITRATOR

APPEARANCES: G. NANETTE THOMPSON, CHAIR, RCA
WILL ABBOTT, COMMISSIONER, RCA
JAMES S. STRANDBERG, COMMISSIONER, RCA

FOR GCI: MR. MARK MODEROW
Corporate Counsel
General Communication, Inc.
2550 Denali Street, Suite 1000
Anchorage, Alaska 99503

FOR ACS: MR. KEVIN CALLAHAN
MS. MARY LOUISE MOLENDA
Patton Boggs, LLP
Attorneys at Law
1031 West Fourth Avenue, Suite 504
Anchorage, Alaska 99501

Exhibit No. E
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HEARING EXAMINER OLSON: I think the Commission has so many questions we're going to take a recess until 10:00 o'clock and then they're going to come back and ask them. Okay. We'll stand in recess.

(Off record - 9:41 a.m.)

(On record - 10:18 a.m.)

HEARING EXAMINER OLSON: We're back on record in U-96-89. The Commissioners have a number of questions for both parties, and Commissioner Thompson is going to lead off.

CHAIR THOMPSON: I'll start with you, Mr. Callahan, since you argued first. Why does it make -- you seem to argue that you'd like us to consider, first, the loop issues, the pricing issues, and then deal with the other issues. And you also seem to be arguing, if I understood, that there really isn't a legal basis for us to address those other issues now. Why is there a legal basis later if there isn't now, or what am I not understanding about your argument there?

MR. CALLAHAN: Well, we think there's clearly a legal basis to address the prices in the existing Anchorage agreement and to make them forward looking. That's clear.

CHAIR THOMPSON: And is that legal basis in federal law, state law, or is it just under the contract, the terms of the contract?

MR. CALLAHAN: Under the contract and under federal law we think.....

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CHAIR THOMPSON: What provision of federal law?

MR. CALLAHAN: I think it comes under the Act. I think that that would be governed by -- I think it would be a determination of this Commission governed by federal law.

CHAIR THOMPSON: Can you cite a provision of the Act that you believe is applicable?

MR. CALLAHAN: Well, yes, let me put it this way. I think that the Act itself creates the obligation to price -- set prices that are in conformance with federal law. And, of course, the FCC has said that those are forward looking prices. Even not withstanding the Eighth Circuit virtually all of the forward looking price methodology remains in place. So, in effect, what we're doing is fulfilling a condition of approval of the agreement, revisiting the approval of the agreement in order to make it conform -- make it conform to federal law.

I mean there's no specific federal regulation that calls for that, but this Commission has been found in the past to have authority in various contexts to set interim prices. I think the federal Act requires us to update those prices so that they conform to the requirements of the Act and are forward looking.

CHAIR THOMPSON: Is there a specific provision of the Act you're relying on or are you relying on the general intent of the Act that we use forward looking prices when we approve interconnection agreements?

MR. CALLAHAN: Yes, the general intent of the Act and federal regulations that we can -- we create forward looking prices that conform with the Act.

CHAIR THOMPSON: So you're not -- is there a legal basis -- what's the legal basis under state law for us to revisit this agreement, the pricing provisions? Is your argument based purely on the contract terms or is there some other provision of state law that you believe requires us to reexamine these issues?

MR. CALLAHAN: I haven't -- I would have to think about that issue, but let me just say this. The APUC clearly believed it had authority to set interim prices at the time it approved the agreement. And I think if one were to look at authority under state law, vis-a-vis interim prices that there is an obligation eventually to have a hearing and to establish permanent prices. There may be a grey area under state law, I haven't addressed that. I mean it's my belief that we have an obligation under the federal Act to update those pricing terms to make them conform to federal law. And -- and that obligation procedurally comes about as a result of the condition of approval of interim prices by the APUC and that even under state law I don't think interim prices can go on indefinitely. I think there would be an obligation to have a hearing and to make them permanent. But my view is this is primarily a matter of bringing those prices into conformance

with the Act. That's the fundamental -- the federal Act. That's the fundamental problem with the prices as they stand. That's the fundamental need to address them.

CHAIR THOMPSON: If we're proceeding under the federal Act do any of the deadlines for approval of interconnection agreement or arbitration proceedings apply to this proceeding?

MR. CALLAHAN: In this case I don't think so. I think this is an anomaly because of the conditional approval of the interim prices. And I guess my view would be that we simply have an obligation to conform those prices to the Act expeditiously, but I -- but I believe other requirements of federal law would apply. I believe the Commissions -- for example, a determination by the Commission of prices would need to conform with federal Act requirements. I think under the language of the Act that would be a determination which the Act makes reviewable in federal court. I know there's a debate about sovereign immunity and the like, and those are other issues, but I think it would be a determination under federal law with respect to an arbitration agreement and would fall within the Act.

But no, it doesn't clearly within a timing framework for a negotiation or arbitration. It's not a new negotiation or arbitration. It's fixing an existing agreement to make it conform to federal law. And it was implicit in the condition of approval of the '97 agreement.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.	)	
Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b)) and 252(e)(5) of the Communications Act	)	WC Docket No. 02-201

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

Shelly McCormick, being first duly sworn, deposes and states that:

1. I am a citizen of the United States of America, over the age of 19 years, and not a party to this proceeding; I am a Law Office Assistant I at the Office of the Attorney General in Anchorage, Alaska.

2. On August 16, 2002 I served by first class mail and facsimile correct copies of COMMENTS OF THE REGULATORY COMMISSION OF ALASKA; and AFFIDAVIT OF SERVICE in this proceeding on the following:

Karen Brinkmann
Elizabeth R. Park
LATHAM & WATKINS
Suite 1000
555 Eleventh Street, N.W.
Washington, D.C. 20004-1304

3. On August 16, 2002 I served by messenger correct copies of COMMENTS OF THE REGULATORY COMMISSION OF ALASKA; and AFFIDAVIT OF SERVICE in this proceeding on the following:

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Leonard Steinberg
Alaska Communications Systems
600 Telephone Avenue, MS 65
Anchorage, AK 99503
facsimile no.: (907) 297-3153

Mark Moderow
General Communications Inc.
2550 Denali St. Ste. 1000
Anchorage, AK 99503
facsimile no.: (907) 265-5676

4. On August 16, 2002 I sent by commercial overnight delivery correct courtesy copies of COMMENTS OF THE REGULATORY COMMISSION OF ALASKA; and AFFIDAVIT OF SERVICE in this proceeding on the following:

Chief, Pricing Policy Division
Wireline Competition Bureau
Room 5-A225
445 12th Street, SW
Washington, D.C. 20554

Qualex International
Portals II
445 12th St., S.W., Rm CY-B402
Washington, D.C. 20554

J.Bradford Ramsay, General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW, Suite 200
Washington DC, 20005

Shelly McCormick

KARYL RICHARDS NOTARY PUBLIC STATE OF ALASKA

SUBSCRIBED AND SWORN to before me on this 16th day of August, 2002

Karyl Richards
Notary Public, State of Alaska
My commission expires: 4·20·05

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100